THE PUBLIC/PRIVATE BALANCE IN LAND USE REGULATION*

*Mark W. Cordes***

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INTRODUCTION

The topic of the balance between public and private interests in land is one of growing importance and increasing controversy. The environmental movement of the last three decades has generated significant and varied government regulation, much of it placing restrictions on the use of privately owned land. In turn, the past few years have seen a growing property rights movement, largely in response to such regulation.[1] The interplay between private and public interests affects all types of land ownership and property uses, but is perhaps most pronounced with regard to environmentally sensitive land.[2] Effective protection of such property often requires that it be left in its natural state, thus minimizing development opportunities. This raises an increasingly critical question in our society: what rights do private property owners have in privately owned land and what rights should the public have in the same resource.

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** Professor, Northern Illinois University College of Law; B.S., Portland State University; J.D., Willamette University; J.S.M., Stanford University.

1. For commentary on the property rights movement, see Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights and the New Takings Legislation*, 53 WASH. & LEE L.REV. 265 (1996); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996); *see also*, Marianne Lavelle, *The "Property Rights" Revolt*, NAT'L L.J. May 10, 1993 at 1, 34.

2. *See* Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 78 (1995) (describing ecologically sensitive lands "such as wetlands, barrier islands, riparian corridors, endangered wildlife habitats and the like").

In addressing this topic this article will do three things. Part One will first present a thumbnail sketch of the current balance of public and private rights as reflected in constitutional law, commonly known as the "takings" issue. Although this is by no means the only manner in which the law balances public and private interests in property, federal constitutional protections are commonly viewed as providing the bedrock balance of interests and will be the focus of Part One of this article. As it will indicate, this balance leans heavily towards the private side concerning the right to possess property and exclude others, as well as protecting against state interference with current uses. However, the balance shifts significantly toward the public side when the issue is restricting use of undeveloped property and restricting future uses.

Part Two of this article will then present what I consider to be the big-picture rationale for striking the balance in this way, which is that property is a social construct designed to serve social as well as individual purposes. Such a perspective is well-established in our legal tradition and best explains historical and legal views of property ownership. As such, private property rights have always been viewed as being subject to broader public interests, and private interests must end when they inflict harm on the broader public. Importantly, this accommodation between private and public interests is an inherent limitation in the bundle of property rights, rather than a deprivation of preexisting rights.

Finally, Part Three of this article will discuss whether recognizing a strong public or social interest in privately owned land is fundamentally unfair to private landowners, especially when the effect is to substantially lower property values. Although in some instances government regulation might result in unfairness, as a general matter there are three reasons why recognizing a social obligation in private property is not unfair even when regulation diminishes property value. First, any reasonable investment expectations regarding future uses of undeveloped land should include the possibility of regulation to protect public interests. Second, much of the value in private property has been added by government "givings" in the first instance, and it cannot be viewed as unfair when government regulations for important purposes diminish some of that same value. Third, fairness concerns must also be evaluated from a broader perspective of "reciprocity," which recognizes that although a landowner might be adversely affected by some regulatory actions, the same person is often benefitted by other regulatory actions, and that overall a general adjustment of benefits and burdens occurs.

I. THE CURRENT PUBLIC/PRIVATE BALANCE IN TAKINGS JURISPRUDENCE

In examining the balance between public and private rights in privately owned property, one can envision two possible extremes. On the one hand, private property rights might be viewed as absolute, with no limits on how property might be used. At the other extreme, property ownership could be viewed as being held completely at the will of the state with no truly private interests in land; rather, property would be subject to complete revocation by the state.

Although there are proponents for both of these positions, the American system has not adopted either one of these extremes. Rather, it has long recognized that property ownership has both a public and a private dimension to it. By this, I simply mean that both the public and private landowner have legitimate interests in property use, and our legal system seeks to accommodate both within reason.

This balance is reflected in a number of legal norms, but is perhaps best evidenced in the current United States Supreme Court takings jurisprudence. This jurisprudence provides the bedrock foundation for protection of private property interests, and might well be viewed as representing the current balance of private and public interests in private property. The takings clause does not, of course, prevent the government from taking property for public use, but rather qualifies that right in one essential way: just compensation must be paid.[3] As a practical matter, therefore, current takings jurisprudence delineates when government regulation requires compensation and when it does not.

Commentators frequently note that the current state of takings law is quite confusing and vague.[4] This article will not attempt a comprehensive review or analysis of takings doctrine, which has often been done elsewhere.[5]

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3. The Fifth Amendment's Taking Clause states that "nor shall private property be taken for public use, without just compensation." *See* U.S. CONST. amend V. As noted in a leading property text, it is "beyond dispute" that this provides government with the power of eminent domain. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1141 (3d ed. 1993).

4. *See, e.g.*, J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 102 (1995) ("an unworkable muddle"); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L.REV. 91, 92 (1995) ("[r]egulatory takings are proving to be one of the enduring legal dilemmas of the twentieth century"); Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles*, 77 CAL. L.REV. 1301, 1303-04 (1989) ("doctrinal and conceptual disarray").

5. *See, e.g.*, Oswald, *supra* note 4; Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L.REV. 1393 (1991); Peterson, *supra* note 4; William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE

Rather, it will simply outline the basic parameters of the current law and how it relates to respective private and public interests in land.

The bedrock of modern takings jurisprudence is the seminal decision of *Pennsylvania Coal Company v. Mahon*,[6] where the Supreme Court first recognized that the mere regulation of property for legitimate purposes might constitute a taking if its economic impact is too severe. In that case, the Court reviewed a state statute which prohibited the mining of coal when subsidence damage would result, effectively requiring coal companies to keep a portion of coal in the ground.[7] The Court announced the general principle that although government need not pay compensation every time regulations reduce property values,[8] if a regulation "goes too far" it would be considered a taking.[9] Although *Pennsylvania Coal* established the basic principle that regulatory takings occur when government regulation "goes too far," the Court gave little guidance as to when that point is reached,[10] noting only that at bottom the question is one of fairness.[11]

In subsequent years the Supreme Court has typically addressed the issue of regulatory takings in an ad hoc manner, looking at a number of factors to see if the regulation has "gone too far." This is clearly seen in a more recent and significant decision, *Penn Central Transportation Co. v. New York City*.[12] In that case, the Court emphasized that its takings analysis involved "essentially ad hoc, factual inquiries" rather than any set formula.[13] The Court then proceeded to identify several factors relevant in a takings analysis, which might loosely be called the *Penn Central* factors. Primary among them are the nature of the regulation, the purposes it serves, and the interference with investment-backed expectations.[14] Applying these factors the Court said that

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L.J. 694 (1985). Two older and very influential articles are Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L.REV. 1165 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

6. 260 U.S. 393 (1922).

7. *See Pennsylvania Coal*, 260 U.S. at 412-13.

8. The Court stated that government could not go on if it had to pay every time its regulations adversely affected land values, and thus some diminution in value had to be accepted by landowners. *See id.* at 413.

9. *See id.* at 415.

10. The Court in *Pennsylvania Coal* was not entirely clear why it thought the regulation had gone too far so as to be a taking, and the Court's analysis is subject to several interpretations. One significant factor, however, was that the effect of the statute was to make the mining of anthracite coal "commercially impracticable." *Id.* at 414.

11. *See id.* at 416.

12. 438 U.S. 104 (1978).

13. *Penn Cent.*, 438 U.S. at 124.

14. *See id.*

New York City's Landmark Preservation Law did not constitute a taking as applied to the plaintiff's land, in particular emphasizing that it did not interfere with any current uses of the property and allowed a reasonable return.[15]

The Court's most recent regulatory takings decision is *Lucas v. South Carolina Coastal Council*,[16] where it brought some analytical clarity, albeit limited, to the takings issue. In that case the Court reviewed a state statute which had the effect of prohibiting any development on two beachfront lots purchased by the plaintiff for residential construction.[17] The Court began its analysis by noting that it had generally avoided any "set formula" in deciding taking cases, instead engaging in "essentially ad hoc, factual inquiries."[18] It noted, however, that it had previously identified two types of categorical takings, which are instances where, if certain facts are established, it will be deemed a taking and just compensation required.[19] First, the Court recognized that any permanent physical invasion or occupation of private land, no matter how minimal, constitutes a taking and must be compensated.[20] This includes not only efforts to take title to property, but also any attempt by government itself to intrude on land or permit third parties to intrude on land.[21] The Court viewed the ability to exclude others to be at the core of land ownership and thus even minimal occupations require compensation,[22] reiterating a sentiment expressed in a number of other cases.[23] Thus, at least with regard to the

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15. *See id.* at 136.

16. 505 U.S. 1003 (1992).

17. The plaintiff had in fact purchased the two lots for a total of almost one million dollars, at a time when construction of single family homes was permitted under applicable law. Subsequent to the purchase a law was passed designating the plaintiff's property as a critical area and precluded any development, forcing the plaintiff to keep the land in its natural state. *See Lucas*, 505 U.S. at 1008-09.

18. *Id.* at 1015 (quoting *Penn Cent.*, 438 U.S. at 124).

19. *See id.*

20. *See id.*

21. Previous Supreme Court cases had found takings based upon a physical invasion when the government itself had physically invaded property interests. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946) (physical invasion of airspace). Takings have also been found where the government required landowners to permit third parties on the property. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (law requiring landlords to allow cable companies to place cables on neutral properties).

22. *See Lucas*, 505 U.S. at 1015.

23. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987); *Loretto*, 458 U.S. at 419; Kaiser Aetna v. United States, 444 U.S. 164 (1979). The Court has recently again emphasized in a post-*Lucas* decision that the right to exclude is a particularly significant attribute of property ownership and even minimal interferences with it constitute takings. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

possession of land, *Lucas* struck the balance heavily toward the private dimension of land ownership, suggesting it reaches near absolute status.[24]

The second type of categorical taking recognized in *Lucas* concerned regulatory takings. In such situations the Court said a categorical taking occurs when the regulation leaves no economic viability.[25] This standard had in fact been stated as dictum in a number of earlier decisions,[26] although the Court had never actually found a taking on that ground. In stating this standard in *Lucas*, the Court did not give much guidance on how to assess economic viability, since it relied on a trial court finding that the regulation made the property "valueless."[27] It suggested in dictum, however, that the most obvious instance of no economic viability is where property, in its totality, must be left in a natural or undeveloped state.[28]

Although the Court in *Lucas* recognized that a categorical taking occurs when regulation results in no economic viability, it importantly did not limit regulatory takings to only those situations. Rather, it affirmed that even when property retains some economic viability there might be a taking under the ad hoc balancing test previously recognized in *Penn Central*.[29] Under that test a court will balance several factors, most notably the degree of interference with distinct, investment-backed expectations and the particular purpose behind the regulation to determine whether a regulation has gone too far and should be considered a taking.[30]

As a practical matter, this ad hoc balancing test will rarely result in a taking when there is some economic viability and no interference with existing uses. Thus, in a typical scenario where development restrictions are placed on environmentally sensitive land, a taking will usually not be found as long as some economic viability remains on the property, even when there is substantial diminution in value.[31] However, the focus on interference with

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24. The Court has not explained the reasons for this, but it parallels the common law's similar emphasis on a landowner's right to exclude others from the property. A right to exclude is, of course, necessary to encourage investments in property. Perhaps more relevant is the important role the right to exclude plays in providing an area of autonomy for individuals vis-a-vis the state and other people. *See infra* text accompanying notes 38-40.

25. *See Lucas*, 505 U.S. at 1015.

26. *See Nollan*, 483 U.S. at 834. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

27. *Lucas*, 505 U.S. at 1009.

28. *See id.* at 1018.

29. *See id.* at 1019 n.8.

30. *See id.*

31. *See* Eric T. Freyfogle, *supra* note, 2 at 87-88 (noting that courts will permit restrictions on wetlands development, even where diminution in value exceeds fifty percent, as

investment-backed expectations arguably becomes quite important if government attempts to restrict current uses, which likely reflect substantial investment dollars.[32] Absent a nuisance,[33] any such interference with current uses on developed property might well result in a taking unless a reasonable time period is given to amortize the use.[34] As a practical matter, the Court has not needed to speak directly on the issue, since government almost always grants nonconforming status to existing property uses, recognizing the need to protect such investments.[35] It is important to emphasize, however, that current takings analysis is generally protective of private interests involving current uses of property;[36] it leans to the public side of the equation only when future uses are the issue.

The current private/public balance as reflected in the Supreme Court's takings jurisprudence might be summarized in the following manner. With regard to a landowner's right of possession and right to exclude others, the current balance weighs very heavily in favor of the private interests. With regard to restrictions on current uses of land, the law is less developed, though the Court's emphasis on investment-backed expectations strongly suggests it again weighs toward the private interests. It is only in the instance of potential uses, often on undeveloped land, that the balance generally weighs more

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long as some economic viability remains).

32. The Supreme Court's decision in *Penn Central*, where the Court first clearly articulated the "interference with investment-backed expectations" standard, emphasized that existing uses were not interfered with in concluding there was no taking. *See Penn Cent.*, 438 U.S. at 136. Although not directly addressing the issue, the Court seemed to strongly suggest that the taking argument becomes much more significant when current uses are restricted.

33. The Court has indicated in several cases that if government regulation is aimed at preventing a nuisance it will not be a taking, even if it restricts existing uses reflecting substantial development costs. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (city prohibition of operation of a brickyard in residential area not a taking, even though reduced value from $800,000 to $60,000); *see also* Goldblatt v. Hempstead, 369 U.S. 590 (1962) (restricting operation of a quarry in residential area not a taking); Miller v. Schoene, 276 U.S. 272 (1928) (state order to destroy diseased trees not a taking). The reason that interference with such existing uses is not a taking, even when substantial diminution in value might result, is that nuisance-causing uses were never part of the landowner's title to begin with. *See Lucas*, 505 U.S. at 1029-31.

34. The fact that takings law generally protects investments in existing uses has been frequently noted by commentators. *See, e.g.*, Rose, *supra* note 1, at 285-86; John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989).

35. *See* 4 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 51.01[2][a], at 51-5 (Edward H. Ziegler, Jr., ed. 1997) (law generally recognizes a vested right to continue nonconforming uses).

36. *See* Freyfogle, *supra* note 2, at 134 ("[i]n the law of takings, a considerable difference exists between a regulation that interferes with a current land use and one that bans a prospective land use.")

heavily toward the public side of the equation.[37] In such instances the state can place substantial restrictions on future uses without paying compensation as long as some economic viability remains. This in effect recognizes a strong public or social dimension to the property. The next part of this article will address why the balance should weigh so heavily toward the public side in cases of undeveloped land uses, especially with regard to environmentally sensitive land.

II. PROPERTY AS A SOCIAL CONSTRUCT

Private land ownership in our country has long been viewed as involving both private and public dimensions. On the one hand, protection of private interests in land is critical to efficient uses of resources and incentives to development.[38] Without "reasonably secure expectations of continued ownership"[39] there would be little reason to improve resources and property. Such improvement and development activity is critical to the provision of essential services and goods, such as housing. Moreover, private property is necessary for personal autonomy and privacy.[40] Thus, the law historically has and continues to protect private interest in land ownership.

At the same time, the law has also recognized a strong social dimension to property ownership. This recognition of a strong public interest in privately owned land is not a recent invention of the Supreme Court, but rather traces its origins back to the beginning of our country and is a consistent theme in property law.[41] It is clearly seen in the *sic utere* principle of nuisance law,

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37. For a strong argument that the takings clause does not and should not require compensation for interference with future or potential uses of property, see Humbach, *supra* note 34, at 365-69.

38. *See* Rose, supra note 1, at 267-68.

39. *See id.* at 268; *see also*, Humbach, *supra* note 34, at 347 ("[p]eople more likely will sow when they are assured that they can reap and enjoy the fruits of their efforts").

40. The privacy and autonomy serving function of private property has been frequently noted by both courts and commentators. The Supreme Court strongly stated this position in *Carey v. Brown*, 447 U.S. 455 (1980):

> Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick." The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

Id. at 471 (citations omitted).

41. A number of commentators have discussed the long-standing recognition of a strong public interest in privately owned land and how it is firmly established in the English and American legal traditions. For a recent and particularly excellent discussion of the topic, see

which states that a person cannot use his or her property in such as way as to harm the property rights of another.[42] More significantly, the recognition of a strong public interest in privately owned property has also been long recognized with regard to public restrictions on land use. Early America often regulated property use for the public good,[43] including various restrictions on perceived noxious activity[44] and even restrictions on what crops could be grown.[45] Moreover, courts have long held that government can place reasonable restrictions on land use for the public good.[46] This includes not only restrictions on existing land uses that create a nuisance, but restrictions on future development that might interfere with broader public interests.

This long-standing recognition that use of private property is subject to broader social concerns has often been referred to as the social function of property.[47] It reflects the fundamental concept that property is a social construct whereby society creates and maintains property rights in the first instance.[48] For this reason inherent in the state's creation of property is its ability to limit the extent of property interests for broader social purposes. Indeed, it has long been recognized that property would not exist without the

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Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVT. L. 1095 (1996); *see also* Rose, *supra* note 1, at 274-82.

42. "*Sic utere*" is short for "*sic utere tuo alienum non laedas*, meaning, in essence, that every person should so use his own property as not to injure that of another." *See* Morgan v. High Penn Oil Co., 77 S.E.2d 682, 689 (N.C. 1953); *see also*, Freyfogle *supra* note 2 at 100-01 (discussing evolution of *sic utere* principle in Anglo/American law and noting how it illustrates the inherent ambiguity of absolute ownership).

43. *See generally* Duncan, *supra* note 41, at 1133-37. *See also*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1055-60 (1992). (Blackman, J., dissenting).

44. *See* Leslie Bender, *The Takings Clause: Principles or Politics*, 34 BUFF. L. REV. 735, 751-52 (1985).

45. *See* Duncan, *supra* note 41, at 1135 (discussing restrictions during colonial period on what crops could be grown).

46. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 665 (1887) ("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1851); Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846); *see generally* Duncan, *supra* note 41, at 1142-54.

47. *See, e.g.*, Gerald Torres, *supra* note 1, at 5 (discussing the social function of property).

48. Commentators have often noted that property is a social creation of the state. *See, e.g.*, Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 182 (1995); Humbach, *supra* note 33, at 344-45.

state and it is thus subject to certain implied limitations.[49] Primary among them is that property may not be used in a manner that harms the public.[50]

Construing property interests in this manner implicitly recognizes that the use of property inevitably extends beyond land boundaries and will often conflict with other social needs, necessitating a reasonable accommodation. Although fairness and the need to encourage investment in property requires protection of private interests in many instances, it is reasonable to view those private interests as ending when they inflict harm on the broader public. Importantly, accommodation between private and public interests is an inherent limitation in the bundle of property interests, rather than a deprivation of any rights.

That this is an inherent limitation of property ownership, rather than a deprivation of preexisting rights, is seen in a number of early judicial decisions. When reviewing restrictions on land use to serve social purposes, courts not only usually upheld such restrictions, but consistently viewed such limitations as being inherent in the property to begin with. For example, as long ago as 1846, in *Commonwealth v. Tewksbury*,[51] the Massachusetts Supreme Court upheld a statute which had the effect of prohibiting owners of private beaches from removing any sand or stones. In recognizing a public interest sufficient to limit use of even private beaches, the court stated "[a]ll property is acquired and held under the tacit condition that it shall not be used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community."[52]

This sentiment was expressed in a number of other early cases where private land use conflicted with public interests, typically with shared resources such as air and water.[53] Courts consistently recognized that private interests were not absolute and must yield to public interests when conflicts arise. This recognition of inherent limits on private property interests is similarly seen in the widespread growth and acceptance of land use restrictions in the early part of this century. In recognizing the validity of such restrictions courts recognized that property rights are not absolute but necessarily limited by the broader good.[54] The Supreme Court itself

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49. *See* JEREMY BENTHAM, THEORY OF LEGISLATION 113 (R. Hildreth trans., Trubner 1864) ("[b]efore laws were made there was no property; take away laws, and property ceases.").

50. *See Mugler*, 123 U.S. at 665; *Tewksbury*, 52 Mass. (11 Met.) at 57.

51. *See Tewksbury*, 52 Mass. (11 Met.) at 55.

52. *Id.* at 57. For an excellent discussion of *Tewksbury* and other early cases, see Duncan, *supra* note 41, at 1147-52.

53. *See generally* Rose, *supra* note 1, at 270-72.

54. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); Freyfogle, *supra* note 2, at 104-05; Humbach, *supra* note 34, at 341.

recognized this principle in a number of decisions during this period, frequently stating that property use was limited by public interests.[55]

The inherent social obligation of private property is most apparent with restrictions on how property is used. Although less likely to arise, a social function of property has even been applied to place limits on the right to exclude, typically considered at the heart of property ownership. As recently indicated by Joseph Singer, at common law, owners of inns and similar accommodations were often required to serve all who came and could not refuse service.[56] This clearly limited the normal right to exclude, indicating a social obligation attached to such property. This same concept was seen more recently in the well-known decision of *State v. Shack*,[57] where the New Jersey Supreme Court noted that the right to exclude did not extend to prohibiting access to migrant workers on private lands, stating that "[p]roperty rights serve human values."[58] Thus, even core property interests such as the right to exclude are implicitly subject to a social obligation in appropriate circumstances.[59]

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55. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power"); Hadecheck v. Sebastian, 239 U.S. 349, 410 (1915) (private property interests must at times "yield to the good of the community"); *Mugler*, 123 U.S. at 665 ("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community").

56. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283 (1996).

57. 277 A.2d 369 (1971).

58. *Shack*, 277 A.2d at 372.

59. Although the right to exclude is subject to a social obligation in appropriate situations, it is less likely to occur than with restrictions on the use of property. This is both because the right to exclude is such an important attribute of property, and because its exercise is less likely to interfere with social concerns. Thus, the private interest tends to be weighty, and the public interest minimal, in most instances where the right to exclude is at issue. Where autonomy and privacy interests are more minimal, such as with private property which is open to the public, competing social concerns, if strong enough, might outweigh the right to exclude. One area in which this issue has frequently arisen is with regard to exercising speech on privately owned shopping center property. The United States Supreme Court has held there is no First Amendment right to exercise speech on shopping center property, in effect stating that a private property owner's right to exclude outweighs any First Amendment rights. *See* Hudgens v. NLRB, 424 U.S. 507 (1976). State courts that have addressed the issue under their own constitutions have split on whether the exercise of state free speech rights outweighs a shopping center owner's right to exclude. *Compare, e.g.*, Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984) (rejecting free speech right in shopping center), *with* Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (recognizing such a right under the California Constitution).

Although the principle that private land is subject to broader social purposes is firmly established in our law, what those purposes are and how they should be balanced against private interests depends on a particular context and is subject to change as social conditions change. To go back to the example of nuisance law, courts have never drawn a clear set of lines outlining what is and what is not a nuisance. Rather, the law has adopted a reasonableness balancing test in which a number of factors are considered in determining whether a particular land use is a nuisance.[60] Thus, the same activity might be considered a nuisance in one instance but not in another. More particularly, what activities are considered nuisances is subject to change as societal conditions and values evolve,[61] so, land uses that might have been considered completely acceptable and desirable a century ago might be considered detrimental and nuisances today.

Similarly, the broader social dimension of property must also be determined according to evolving social conditions.[62] For much of our nation's history there was a societal priority on land development and capture of natural resources.[63] Even here, shared resources such as air and water might require special restrictions. For the most part however, there was little perceived conflict between private and public interests in land; the public or social interest was largely maximized by private interests and development.

In more recent times there has been increasing awareness of the concerns about development. This is particularly true as certain resources, such as open space and wetlands, become increasingly scarce and the supply of land becomes more limited. We have also become more sensitized to the environmental importance of certain land, such as wetlands, coastal zones, and wildlife habitats, and how they serve the public good in previously unforeseen ways. Though land development certainly continues to be an important goal,

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60. The law of nuisance prohibits substantial and unreasonable interference with the land of another. Thus, only those substantial interferences which are deemed unreasonable are considered nuisances. Reasonableness is determined by examining a number of factors, including the gravity of the harm, the extent of the harm, the social value of the respective uses, the suitability of the respective uses to the locale in question, and the ability of either party of avoiding the harm. *See* RESTATEMENT (Second) OF TORTS §§826-828. *See also*, DUKEMINIER & KRIER, *supra* note 3, at 959-61.

61. *See* Freyfogle, *supra* note 2, at 100-02 (discussing changing nature of nuisance law as societal conditions change); Rose, *supra* note 1 at 273 ("[i]ncreasing congestion in common resources is a major reason for the evolution of legal definitions of property rights").

62. *See* Rose, *supra* note 1, at 274-82 (discussing the evolving nature of public interests in land).

63. *See* Freyfogle, *supra* note 2, at 95-97 (discussing America's early "frontier ethic" which, "[b]ecause of its vastness and plentitude, . . . encouraged a consumptive, aggrandizing culture"); *see also* Humbach, *supra* note 34, at 339-40.

closely tied to societal needs such as housing, it must be more carefully balanced against the need to preserve environmentally sensitive land.

Efforts in recent years at protecting such environmentally sensitive land have made the tension between the public and private dimensions of property ownership more pronounced. There is little doubt that a strong public interest exists in preserving areas such as wetlands, open space, and coastal zones, and for that reason they are viewed as subject to a social obligation because of the harm development would do. However, unlike typical zoning regulations which permit some development, regulations on wetlands and similar property typically prohibit development altogether, at least on a portion of the property. This will often result in a substantial diminution in value.

Property rights proponents have in turn questioned the fairness of recognizing a social obligation on the owners of such properties when such an obligation results in substantial losses in land value.[64] Although generally not questioning the ability of government to regulate environmentally sensitive land for the public interest, property rights proponents have argued that fairness requires that loss in value be placed on the public through compensation requirements.[65] In essence they suggest that such regulations extend beyond what can be legitimately considered a public interest in such property and reach the private dimension of ownership, for which compensation should be given.

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64. *See* Michael M. Berger, *Dollars and Damages: A Debate: Yes! It's the Fair Thing to Do*, PLANNING, Mar. 1996, at 22; Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C. L. REV. 613, 636 (1995).

65. There has been a significant property rights movement in the United States over the last decade. A prominent agenda item has been the attempted reshaping of takings analysis through proposed federal and state legislation. To date most enacted legislation has simply required state government and agencies to engage in "taking assessments" to determine whether their actions constitute takings under applicable judicial standards. *See, e.g.*, IDAHO CODE §67-8003 (1995); KAN. STAT. ANN. §77-704; TENN. CODE ANN. §12-1-203 (Supp. 1998); UTAH CODE ANN. §63-90-4 (Supp. 1998). However, a number of states have considered, and several have passed, legislation that would require compensation when diminution in value from government action or regulation reaches a certain point, such as fifty percent. *See* LA. REV. STAT. ANN. §§3: 3601-42 (West Supp. 1999) (compensation required for losses of twenty percent or more; applies only to agricultural and forestland); MISS. CODE ANN. §§49-33-1 to 49-33-19 (Supp. 1998) (compensation required for diminution in value of forty percent or more; applies only to agricultural and forestland); TEX. GOV'T CODE §2007.041 (West Supp. 1998) (compensation required for diminution in value of twenty-five percent or more; applies to all land). For a discussion of proposed and enacted state takings legislation, see Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997). For an assessment of proposed federal legislation, see Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 FORDHAM ENVTL. L.J. 409 (1995).

The short answer, of course, is that in some instances fairness would dictate payment of compensation. As a general matter, however, courts and government have viewed such property as subject to a strong public interest that permits government to restrict the property without compensation. The next part of this article will briefly review the fairness argument and suggest three reasons why in most cases fairness concerns do not require compensation.

III. FAIRNESS AND PUBLIC INTERESTS IN LAND

The issue of fairness in land use regulation in general, and restrictions on environmentally sensitive land in particular, is a very important one. The Supreme Court itself has suggested that its own takings analysis is essentially about fairness in terms of who should bear the cost of regulation. In the seminal regulatory takings case of *Pennsylvania Coal*, the Court stated that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[66] In more recent years, the Court has often stated that the takings clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[67]

Thus, fairness is at the heart of the takings analysis and the fairness issue is this: when should the cost of regulation fall on the government (by requiring compensation) and when should it fall on the landowner (with no compensation). It should be pointed out, of course, that current takings analysis will in some instances deem the impact of regulation so severe as to require compensation. This might likely be the case where the landowner's entire property is required to be left in its natural state leaving no economic viability.[68] In such situations a taking will likely be found requiring compensation.

In many instances, however, restrictions on environmentally sensitive land will result in a substantial economic impact but permit some economic viability. This might well be the case where a significant portion of the property–say 50% to 70%–must be left in its natural state, but the remaining portion can be developed. The Court has made it clear that in such situations the economic impact must be evaluated on the tract as a whole rather than

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66. 260 U.S. 393, 416 (1922).

67. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also*, Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting *Armstrong*); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (quoting *Armstrong*).

68. *See* Lucas v. South Carolina Coastal Council 505 U.S. 1003, 1018 (1992).

simply focusing on the regulated portion.[69] Viewed in this manner there might well be a significant diminution in value, but the property will still retain enough economic viability so as to avoid a taking.[70]

Although takings jurisprudence likely does not mandate compensation in such situations, the issue of fairness remains. In particular, is it fair to have individual landowners bear a substantial diminution in value in order to preserve broader public benefits?

As always, the answer to that question largely turns on the particular facts of any given situation. As a general matter, however, there are several significant reasons to suggest that it is not typically unfair to place such diminutions in value on affected property owners. The initial reason is simply to reiterate what was said in the previous section–that such property is inherently limited by broader social concerns to begin with. Thus, when land use is restricted to serve public interests, nothing is being taken from the landowner. Rather, an inherent limitation on the property is simply being recognized, which results in lost value only because of landowner speculation on what might have happened.[71]

In addition to this basic rationale, three additional reasons exist for suggesting that fairness does not necessarily require compensation when landowners suffer economic loss due to government regulation of environmentally sensitive land.

A. The Problem of Landowner Expectations

An initial and understandable issue concerning the fairness of restrictions is potential interference with landowner expectations in their property, especially when restrictions imposed after the land's purchase result in a substantial loss in value. It is often asserted that fairness dictates that when land use restrictions substantially diminish land values property owners should be compensated because of the interference with their expectations when the land was bought.

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69. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497-99 (1987) (in analyzing economic impact of coal mining regulation as possible taking, affected property is not to be segmented but treated as a whole); *Penn Cent.*, 438 U.S. at 130-31 (takings jurisprudence analyzes economic impact on parcel as whole, not as divided into discrete segments); *see also*, Concrete Pipe and Prods. of Cal. Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 644 (1993) (same). A number of commentators have similarly noted that the property should be viewed as a whole and not divided into discrete segments when analyzing whether a taking has occurred. *See, e.g.*, Blumm, *supra* note 48, at 184-85.

70. *See* Freyfogle, *supra* note 2, at 87-88 (noting courts often sustain regulations on wetlands where diminution in value exceeds fifty percent).

71. *See* Humbach, *supra* note 34, at 365-69.

Certainly protecting reasonable expectations in property is important, but such expectations are themselves necessarily shaped by legal rules surrounding property and in particular the possibility of regulation. As frequently noted by both courts and commentators, to the extent that people expect that property might be subject to broader public interests–and that certainly must be the expectation today–then reasonable expectations must take into account the possibility of regulation.[72] Even such an ardent property rights advocate as Justice Scalia noted in the Supreme Court's *Lucas* decision that "[it] seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."[73]

Land use regulation, therefore, must be viewed as "part of [the] background risk and opportunity, against which we all take our chances [as investors in land]."[74] When a person purchases undeveloped land, there must be the expectation that it might be subject to regulation and that should be factored into the decision, helping shape the reasonableness of expectations. Indeed, the possibility of regulation should also be factored into the market value of the property when purchased.

This is not to say that all state interference with land investment can be readily dismissed on the basis that property owners should have had the foresight that regulation might occur. The Supreme Court itself has stated as part of its takings analysis that even where regulated property retains some economic viability the degree of interference with investment-backed expectations might be so great so as to constitute a taking.[75] The protection of land investment is most reasonably expected, however, when based upon actual development expenditures rather than speculation on future uses. Where a landowner has actually spent money developing land, there is a strong public policy that the landowner can reasonably expect the investment is protected; otherwise incentives for the development of land, critical to our

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72. *See, e.g., Lucas*, 505 U.S. at 1027; Michelman, *supra* note 65, at 415; Humbach, *supra* note 34, at 367-68; Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. L.J. 215, 226 (1995); Freyfogle, *supra* note 2, at 130.

73. *Lucas*, 505 U.S. at 1027. The Supreme Court has also noted in several other regulatory contexts that market participants should reasonably expect new restrictions. *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986) ("[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end") (quoting FHA v. The Darlington, Inc. 358 U.S. 84, 91 (1958)).

74. Michelman, *supra* note 65, at 415.

75. *See Penn Cent.*, 438 U.S. at 214. The Court in *Lucas* made clear that the degree of interference with investment-backed expectations might be so great as to constitute a taking even when the property retains some economic viability. *See Lucas*, 505 U.S. at 1019 n.8.

economic well-being, are jeopardized. For that reason the law generally, and takings analysis specifically, provides significant protection for such expectations, absent a nuisance-like activity.[76]

But where the investment is merely the purchase of land for future development the case is less compelling. In that instance the investment does not reflect actual improvement to the property but rather speculation on what might take place. Since what is being lost are simply possible future uses, which involve interests never guaranteed under our legal system, expectations must be viewed as contingent at best. And, as emphasized above, reasonable expectations must recognize the possibility of regulation to serve public interests, and must necessarily reflect that risk in investment decisions.[77]

B. Accounting for Givings as well as Takings

A second reason why it is not necessarily unfair to restrict private property to serve public interests, even when it results in a substantial loss in value, is that much of that value was the result of public, as opposed to private, activity to begin with. This is often known as the "givings" argument, to highlight the fact that government often gives significant value to land as well as takes it away.[78] As such, the extent of true loss is often far less than it might appear to be, lessening fairness concerns.

A focus on givings responds to the common misconception that land values are the result of private efforts, which of course is not the case. Rather, land values reflect a number of factors, a major one of which is public investment.

Government actions frequently add value to land in numerous ways, including such basic subsidies as interest deductions on mortgage payment, which indirectly increases land values. Two of the most obvious types of givings in the context of land, however, are infrastructure development and land use restrictions. Almost any infrastructure support, such as sewer lines and public facilities, adds significant value to land by making necessary services accessible to the property. Although property owners today often pay for some infrastructure through exactions, such exactions reflect the cost of

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76. *See* 4 RATHKOPF, *supra* note 35, § 51.01[2][a], at 51-5 (law generally recognizes a vested right to continue nonconforming uses).

77. For a particularly good analysis of why reasonable investment-backed expectations include the possibility of regulation, *see* Humbach, *supra* note 34, at 365-69.

78. *See* Donald L. Elliot, *Givings and Takings*, LAND USE L. & ZONING DIG., Jan. 1996 at 3; LAWRENCE W. LIBBY, PROPERTY RIGHTS–THE PUBLIC-PRIVATE BALANCE?, MSU LAND USE FORUM CONF., Jan. 9-10, 1996, at 93, 98.

the infrastructure and not the value it adds to the property.[79] More significantly, exactions do not attempt to recover the broader infrastructure support, such as roads, which makes land developable, and without which, commercial value would often be negligible.

The potential impact of government givings on land values can be illustrated by a simple example. Assume a property owner has a tract of remote land worth $10,000. The government then puts in a major highway near the property, creating new commercial opportunities and raising the total value to $60,000 over several years. A short time later, the government imposes an environmental restriction on the property, decreasing its value to $30,000. Although it might initially appear that the government actions diminished property values by 50% in this example, in fact the cumulative effect was to increase value by threefold.[80]

Most real-life examples are not this clearly presented, but the basic point it represents has substantial validity: that government actions account for a substantial part of any land value. Although recognition of a strong public interest in privately owned land is not dependent on such "giving," it helps reinforce the notion of a public interest. Importantly, it also demonstrates that diminution in value resulting from restrictions on environmentally sensitive land is in many instances losses of government-created windfalls, thus substantially minimizing any perceived fairness concerns that might exist.

C. Reciprocity

Closely related to givings is the notion of reciprocity, which is a third reason that restrictions on land resulting in economic loss are not necessarily unfair. Although the Supreme Court has never fully explained the concept, it has long emphasized that a reason for not requiring compensation whenever regulation decreases land value is that regulations will result in an "average reciprocity of advantage."[81] This has been emphasized in a long line of

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79. The Supreme Court's decision in *Dolan* established that "rough proportionality" must exist between the required exaction and adverse effects of development. *Dolan*, 512 U.S. at 391. This in effect limits exactions to the cost of development and not any value added to the land. This is essentially the same as the rational nexus standard often applied by state courts. *See, e.g.*, Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (developers can be required to pay only that portion of the costs that bears a rational nexus to their development). For a discussion of the legal limitations on exactions, see Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 513 (1995).

80. This example is drawn from Cordes, *supra* note 65, at 235-36.

81. For a general discussion of average reciprocity of advantage, see Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings*

Supreme Court decisions, dating back to *Pennsylvania Coal* and affirmed recently in *Lucas*.[82]

The Court's concept of reciprocity is not entirely clear, but might be viewed as having two aspects, what I have described elsewhere as specific and general.[83] Specific reciprocity concerns reciprocal benefits that flow to an owner from the same regulation creating the burden in question. The absence or presence of such specific reciprocity has at times been relevant in analyzing whether a regulation constitutes a taking.[84]

Just as importantly, reciprocity can also be seen from a broader perspective which recognizes the reciprocal benefits of economic regulation in general. The Supreme Court is arguably alluding to this general reciprocity when it says that it is usually fair to assume that legislation is simply "adjusting the benefits and burdens of economic life . . . that secure an average reciprocity of advantage"[85] to everyone concerned. Thus, although a particular regulation might decrease the value of an owner's property, that same owner benefits from numerous other regulations that restrict other

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Jurisprudence, 40 AM. U. L. REV. 297 (1990). For an article critical of the modern application of the "average reciprocity of advantage" test see Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1489-1522 (1997). Professor Oswald states that in its early formulation the test served a useful purpose by comparing the burdens imposed on landowners to the benefits that the same regulation might provide the same landowners. She states that the Supreme Court has more recently "corrupted" the test by comparing the burden on the landowner to the "benefits to *society as a whole*." *Id.* at 1489. She correctly concludes that such a comparison of landowner burden and societal benefits misses the central point of the takings clause, which is the fairness of making individuals bear burdens which should be borne by society as a whole. *See id.* at 1520-22. However, as I suggest in the text, a distinction can be drawn between specific and general reciprocity, both of which concern reciprocal benefits to the affected landowner and thus relate to fairness concerns.

82. *See Lucas*, 505 U.S. at 1017-18; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

83. *See* Cordes, *supra* note 64, at 236-37.

84. *See generally* Colletta, *supra* note 81; Oswald, *supra* note 81.

85. *Lucas*, 505 U.S. at 1017-18 (quoting *Penn Cent.*, 438 U.S. at 124) (citation omitted).

parties.[86] These might include not only other environmentally based regulations, but regulations that facilitate commerce more generally.

Any attempt to consider the fairness of restrictions on land use must acknowledge the importance of these more general reciprocal benefits. To ignore them provides only half the picture and distorts any accurate accounting of regulatory impacts. In particular, it is unreasonable to make government answerable for burdens imposed but not consider benefits created.

This is not to suggest that the idea of general reciprocity makes any land use restriction, no matter what its impact, fair. Certainly some restrictions, even on undeveloped land, might be unfair and even unconstitutional. Yet it is important to realize that burdens in the form of economic loss are only one part of a much bigger picture, one in which those burdened also receive significant benefits. There is no guarantee that benefits and burdens will even out in the long run, but certainly any concept of regulatory fairness must look in both directions.

CONCLUSION

Private land ownership in America has always involved a balance between private and public interests. Protection of private interests is necessary to encourage investments to improve property, essential to meeting critical needs such as housing, as well as providing for personal autonomy and privacy. At the same time private property has also long been limited by implied public interests. This social dimension of property is firmly established in our legal and social culture, and has long been demonstrated in judicial attitudes toward ownership of land. This balance has found expression in takings jurisprudence, where private interests are weighed heavily concerning the right to possession and interference with existing uses, but the social dimension of property is weighed heavily when restricting future uses.

Recent efforts to protect environmentally sensitive land are best viewed in this light. Restrictions which limit development on such land are not

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86. Professor Michelman makes this point in his seminal article on takings: *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, *supra* note 5. He states that:

> Efficiency-motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be erased by compensation settlements. In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed "evenly" enough so that everyone will be a net gainer.

Id. at 1225 (emphasis in original).

depriving landowners of preexisting rights, but rather are simply enforcing the inherent limitation that the property not be used to harm the public. Although at times this might result in substantial diminution in land value, the possibility of such loss must be part of the reasonable investment-backed expectations when undeveloped land is involved. Moreover, any reduced land value will often have been added by government in the first instance, plus losses must be reviewed from the broader perspective of reciprocal benefits and burdens that are part of economic life.

This is not to say that regulation of such property might not constitute a taking under some circumstances. Where a restriction results in the loss of all economic viability compensation is warranted, as well as in limited cases under the Court's ad hoc balancing test. Even when not rising to the level of a constitutional taking, governments might at times want to advance their interests through a Purchase of Development Rights program or provide Transferrable Development Rights to affected landowners, both of which are designed to mitigate perceived unfairness. This might, in some instances, present a more equitable adjustment of the balance between private and public interests in the land.

However, it is important to recognize and affirm that private property ownership in our legal system is not now, and has never been, absolute. Rather, the ownership of private property necessarily involves an accommodation of private and public interests. This accommodation must necessarily evolve over time, with a continuing eye to protecting private interests while addressing public concerns as societal conditions and values change.